



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 22 of 2009

MARTIN MWANGI GATU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of the Senior Resident Magistrate's Court at Mukurweini in SRMCR.535 of 2007 by F.M. KOMBO - SRM)

J U D G M E N T

The appeal of **MARTIN MWANGI GATU** hereinafter referred to as the appellant has been conceded to by the state. The appellant was tried in the Senior Resident Magistrate's Court at Mukurweini and convicted of the offence of defilement of a child contrary to *section 8(1)* of the Sexual Offences Act. Accordingly he was sentenced to 25 years imprisonment. Being dissatisfied with both the conviction and sentence, he lodged this appeal.

When the appeal came up for hearing, **Mr. Makura**, learned Senior State Counsel conceded to the same on the ground that the case was heard by two different magistrates at different times. However the succeeding magistrate did not comply with the mandatory provisions of *section 200 (3)* of the Criminal Procedure Code when he took over the case. In the premises the appellant was prejudiced in the conduct of his defence. Counsel further submitted that he was not seeking a retrial as the complainant reported the incident after 4 months and only after she realized that she was pregnant. DNA was ordered for by the court but was never carried out. Complainant's evidence lacked credibility as it raised doubt as to whether the appellant actually defiled her.

In the response, the appellant as expected welcomed the state's gesture.

I have examined the record of the trial court. It is true that the case was handled by two different magistrates. Indeed **Mr. V.W. Ndururu Ag.SRM** presided over the initial trial and took the entire evidence of prosecution witnesses. Thereafter the case was taken over by **F.M. Kombo, SRM** who heard the defence crafted and delivered the judgment. The taking over of the case by **F.M. Kombo** was necessitated by the fact that **V.W. Ndururu**

had been transferred from the station.

On 11th December, 2008 when the case was taken over the **Mr. F.M. Kombo SRM**, the record reads as follows:-

“Before F. Kombo SRM

Pros – I.P. Simiyu

C/C Faraj Nuru

Accused – present Inter – Eng/Kik

Pros – This is a defence case

Accused – am ready to proceed”

Thereafter the case proceeded to defence hearing. *Section 200* of the Criminal Procedure Code deals with conviction on evidence partly recorded by one magistrate and partly by another as in the instant case. *Section 200 (3)* thereof specifically provide that:-

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witnesses be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right....”

It would appear from the record of the proceedings of the lower court that this mandatory provision of the law was not complied with. Nowhere in the record is it shown that the succeeding magistrate, in this case **Mr. F.M. Kombo SRM** informed the appellant of his right to demand the re-summoning of the witnesses who had already testified before **Mr. V.W. Ndururu**. This omission was fatal. What then is the remedy?

The remedy is found in *section 200 (4)* of the Criminal Procedure Code which provides that:-

“Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial.”

The appellant in his grounds of appeal has alleged that failure by the learned trial magistrate to strictly comply with provisions of *section 200 (3)* of the Criminal Procedure Code was prejudicial to him. I have no reason to disbelief that contention. The state did not seek a retrial on the grounds already set out elsewhere in this judgment which grounds I entirely agree with. In those circumstances it will be unfair and not in the interest of justice to order a retrial.

In the upshot then, the appeal is allowed, conviction and sentence imposed set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE